

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
Petition for Rulemaking to Amend)	
the Commission's Rules Governing)	MB Docket No. 10-71
Retransmission Consent)	

To: The Commission

COMMENTS OF FOX TELEVISION AFFILIATES ASSOCIATION

The Fox Television Affiliates Association ("Fox Affiliates"), by its attorneys, hereby submits its comments on the March 9, 2010 "Petition for Rulemaking" ("MVPD Petition") submitted to the Commission by a group comprised primarily of prominent multichannel video programming distributors, including Verizon, Time Warner Cable, Inc., Cablevision Systems Corp., DISH Network, LLC, and DIRECTV Inc. ("the MVPDs").¹ Citing recent publicity about several high-profile retransmission consent negotiations,² the MVPDs ask the FCC to: (i) implement new retransmission consent dispute resolution mechanisms, such as compulsory arbitration or a newly constituted expert tribunal, and (ii) mandate interim MVPD carriage of

¹ By Order, DA 10-594, released April 2, 2010, the Commission extended the date for filing comments on the Petition to today, May 18, 2010.

² See *Retrans: The Bloody Battle To Save Broadcast Television*, Broadcasting & Cable, Dec. 14, 2009, at 10, available at http://www.broadcastingcable.com/article/439916-Cover_Story_Retrans_The_Bloody_Battle_to_Save_Broadcast_Television.php; Brian Stelter and Brooks Barnes, *No Deal on ABC Is Reached by Disney and Cablevision*, N.Y. Times, Mar. 7, 2010, available at <http://www.nytimes.com/2010/03/07/business/media/07abc.html>; *Mediacom, Sinclair Reach TV Programming Contract*, Wall St. J., Jan. 7, 2010, available at <http://online.wsj.com/article/SB10001424052748704854904574644443210090358.html>; Brian Stelter, *News Corp. Says Deal on Fox Signal Is Unlikely*, N.Y. Times, Dec. 30, 2009, available at <http://www.nytimes.com/2009/12/31/business/media/31cable.html>.

broadcast signals for the duration of retransmission consent disputes. Fox Affiliates ask that the MVPD Petition be summarily dismissed, for the reasons set forth below.

I. Grant of the Relief Requested By the MVPD Petition Would Contravene the Communications Act.

The FCC lacks the statutory authority to grant the MVPD Petition's requested relief. This simple, demonstrable fact renders the ill-conceived MVPD Petition subject to immediate dismissal.

The MVPD Petition opens with a 30-page, skewed review of the current landscape of MVPD/broadcaster retransmission consent regulations and then asks the Commission for two rule changes: (i) introduce into the retransmission consent process new "dispute resolution mechanisms," such as compulsory arbitration or a new "expert tribunal" of undefined contours and composition, mechanisms that would be deployed whenever MVPDs declare that retransmission consent negotiations have "broken down" (Pet. at 32-33); and (ii) mandate "interim" carriage of broadcast signals by MVPDs for the duration of any retransmission consent dispute resolution process. Pet. at 36-37. The express language of the Communications Act bars the Commission from implementing either suggestion.

47 U.S.C. § 325 and related provisions establish a structure in which, every three years, broadcasters elect either retransmission consent or "must-carry" by MVPDs. *See also* 47 U.S.C. §§ 534, 338. Under this statutory framework, broadcasters make an independent decision every three years whether to elect assured MVPD carriage (without compensation) pursuant to must-carry or to test the waters by choosing retransmission consent, with no guarantee of carriage but the possibility of receiving compensation from an MVPD in return for providing consent to

signal carriage. If a broadcaster chooses must-carry, 47 U.S.C. §§ 325(b)(1)(B) and (C) confer on the relevant MVPD the right to retransmit that broadcaster's signal. If a broadcaster elects to proceed down the retransmission consent path, however, that broadcaster's consent to carriage then becomes a statutory essential. In that case, 47 U.S.C. § 325(b)(1)(A) expressly prohibits MVPDs from retransmitting "the signal of a broadcasting station, or any part thereof, *except – with the express authority of the originating station*" (emphasis added).³ Under the retransmission consent pathway, a broadcaster faces the reality that if it withholds its consent, it will receive neither compensation nor the added viewership that MVPD carriage affords. But, when the retransmission consent pathway is being followed, an MVPD's failure to obtain a broadcaster's consent precludes that MVPD from carrying that broadcaster's signal. The statute creates no exceptions to the prohibition on MVPD carriage of a broadcaster's signal, *except* for retransmission consent and must-carry.

The MVPD Petition seeks to revamp this statutory scheme by forcing MVPD carriage of a broadcast signal in disputed retransmission consent cases, not as the result of a broadcaster's consent, but as a result of: (i) an arbitrator's decision; (ii) an expert tribunal's opinion; or (iii) FCC-mandated "interim" carriage by MVPDs during the duration of a retransmission consent dispute. This proposed scheme is flatly contrary to 47 U.S.C. § 325(b)(1)(A), as any broadcast signal carriage on an MVPD *compelled* by arbitration or *ordered* by an "expert tribunal," as well as any FCC-mandated "interim" carriage after the end of a relevant three-year must-

³ "The law governing retransmission consent generally prohibits cable operators and other multichannel video programming distributors, such as satellite carriers, from retransmitting the signal of a commercial television station, unless the station whose signal is being transmitted consents or chooses mandatory coverage." *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4519 (2005) (citing 47 U.S.C. §§ 325(b)(1)(A) and (B)).

carry/retransmission consent cycle, would be accomplished without *any* broadcaster consent, implied or express. Once a broadcaster has elected retransmission consent, the statute allows for no such compulsory carriage.⁴

Where Congress has unambiguously addressed an issue in legislation, an administrative agency must implement the expressed Congressional will and directive. Absent ambiguity, the plain language is “the end of the matter,” eliminating all room for administrative “gloss” or interpretation. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). That is the case here. The language of the statute is simple, direct and mandatory – in the retransmission consent context, “no” MVPD “shall” retransmit a broadcast signal “except” with the broadcaster’s “consent.” The FCC lacks the authority to create a new system featuring compulsory arbitration, expert tribunals, and/or FCC-mandated interim carriage in lieu of broadcaster consent.

Oddly, the MVPD Petition cites the FCC’s “Good Faith Order” of 2000 as supportive of its basic position (*see, e.g.*, Pet. at 15 n.46). In that proceeding, certain MVPDs had asked the Commission to implement FCC-mandated carriage of broadcast signals pending resolution of carriage disputes. In language that has direct application here, the FCC made clear that:

Two equally unambiguous [statutory] provisions . . . foreclose the approach advanced by MVPD commenters. First, Section 325(b)(1) of the Communications Act provides that ‘No cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, *except . . . with the express authority of the originating station. . .*’ This language clearly prohibits an MVPD, except during the [now expired] six-month period allowed under Section 325(b)(2)(E),

⁴ *See also* 47 U.S.C. §§ 325(b)(2)(E) and (e) (providing satellite carriers a one-time 6-month window, now long since expired, in which to retransmit local television broadcast signals regardless of broadcaster consent, and imposing substantial penalties on satellite carriers that carry broadcast signals without such consent after expiration of that 6-month window).

from retransmitting a broadcasters signal if it has not obtained express retransmission consent. Second, Section 325(e) of the Communications Act establishes a streamlined complaint procedure through which broadcasters may seek redress for allegedly illegal retransmission of local broadcast signals by satellite carriers. . . . Against the backdrop of the express language of these provisions, *we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.*

See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order, 15 FCC Rcd. 5445, 5471 (2000) (internal citation omitted) (italics supplied). In light of the clarity of the relevant statutory provisions, Fox Affiliates urge the FCC to summarily dismiss the MVPD Petition. The same statutory block recognized by the FCC in 2000 still exists today.

The preclusive effect of 47 U.S.C. § 325(b)(1)(A) is nowhere even acknowledged, much less addressed, in the MVPD Petition. Instead, the MVPD Petition claims to find support in an irrelevant statutory provision, 47 U.S.C. § 325(b)(3)(A), which concerns rate regulation (but has nothing to do with the issue of carriage in the first instance) (Pet. at 31), or more generalized statutory grants of authority to the FCC. *See, e.g.*, Pet. at 38 nn.121 & 122, *citing* 47 U.S.C. §§ 154(i) and 303(r). None of those provisions overcomes the specific preclusion found in 47 U.S.C. § 325(b)(1)(A). *See Fourco Glass Co. v. Tranmirra Products Corp.*, 353 U.S. 222, 228–29 (1957) (“Specific terms prevail over the general in the same or another statute which otherwise might be controlling.”) (internal quotations and citations omitted). Citations in the MVPD Petition to retransmission consent-related commitments made by News Corporation in acquiring control of Hughes/DIRECTV (Pet. at 33–34), and to good-faith negotiation obligations imposed by statute on broadcasters and MVPDs (Pet. at 15), are quite beside the point.

Voluntary undertakings made by a broadcast company in an assignment context and generalized good-faith negotiation obligations in no way justify or allow compulsory MVPD carriage of broadcast signals.

II. The MVPD Petition's Request for Relief Lacks a Factual Predicate.

Assuming *arguendo* that the FCC were not precluded by 47 U.S.C. § 325(b)(1)(A) and related provisions from adopting the MVPD Petition's requested relief, the MVPDs have not established a factual predicate for that relief. The Petition is filled with exaggeration that does little, if anything, to elucidate the current status of retransmission consent negotiations between MVPDs and television broadcasters. In the MVPDs' biased view, the retransmission consent landscape features "pervasive [broadcaster] brinksmanship" (Pet. at 31) and "windfall profits for broadcast licensees" (*id.* at 3) gained by "extracting cash compensation" from MVPDs (*id.* at 14) in a way that "harm[s] consumers" (*id.* at 20). The reality is quite different.

It is true that an MVPD universe dominated at the time of the 1992 Act⁵ by cable monopolists has now become more competitive through the growth of satellite companies DISH and DIRECTV and the market entry of wireless companies like Verizon. But the MVPDs are plainly wrong about the way broadcasters' retransmission consent rights and related negotiations fit into the overall competitive balance.

Contrary to MVPD portrayals, broadcasters do not have unfair leverage over MVPDs, nor do broadcasters hold consumers "hostage" during negotiations. Rather, with the advent of competition over the last several years between and among MVPDs, a true marketplace for

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Act").

broadcasters' retransmission consent rights has been emerging for the first time. So long as a cable monopolist was a locale's only multichannel provider, there was no "marketplace" in which a broadcaster could operate. For this reason, cash compensation to broadcasters was virtually non-existent for many years after passage of the 1992 Act. Now, the MVPDs are simply *unhappy* that this newly emergent marketplace no longer allows a particular MVPD, no matter its size, to avoid paying what is only now beginning to approach a fair price for the popular broadcast programming fare that helps drive MVPD revenues. The eventual emergence of a marketplace for broadcast signals was quite properly and favorably anticipated by the 1992 Act.

The MVPDs stake their position favoring government intervention⁶ on a few isolated disputes that involved the potential for temporary loss of a single channel of programming in certain markets, but the larger picture reveals that a healthier retransmission consent marketplace is only now, nearly two decades after passage of the 1992 Act, beginning to emerge. Cash payments no longer flow only to non-broadcast program suppliers. Over the last several years, broadcasters are beginning to receive some payment for the extraordinary relative value their signals provide in the multichannel MVPD universe. Broadcasters have watched cash payments flow for years to MVPD-only programmers whose programs have attracted only fractions of the

⁶ The position taken in this proceeding by the MVPDs, several of which are huge companies (e.g., Verizon, \$107.8 billion in 2009 revenues; Time Warner, \$17.8 billion in 2009 revenues), is totally inconsistent with MVPD positions taken before the FCC in other proceedings. *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642 (2010) (arguing that the Commission may act only pursuant to *specific* delegated authority). The FCC should follow the "only pursuant to express authority" argument elsewhere advocated by MVPDs.

viewership delivered by broadcast stations.⁷ A fairer allocation of MVPD revenues among the various suppliers who provide the programming on which MVPDs depend can only benefit the public by helping to fund more and better quality programming from broadcasters, the segment of the video industry most closely aligned with the public and the public interest. *See* Pet. at 19 (citing the “‘must have’ nature” of certain broadcast programming) and 34 (citing “the public’s reliance on broadcast television”).

The small number of disputes that have fueled the MVPD Petition are just minor bumps and normal adjustments, to be expected in a newly emergent marketplace.⁸ Even these disputes are typically quite brief in duration and often entail market-based, voluntary extensions of

⁷ For example, ESPN reportedly receives, on average, \$4.10 per month per subscriber. Brian Stelter, *Next Up on Cable TV, Higher Bill for Consumers*, N.Y. Times, Jan. 4, 2010, *available at* <http://www.nytimes.com/2010/01/04/business/media/04cable.html>. Yet, in an average week, ESPN has far fewer primetime viewers than broadcast networks or their affiliates, which reportedly receive a far lower monetary payment. *Compare* Bill Gorman, *TNT Again Slam Dunks Weekly Cable Ratings*, TVbytheNumbers.com, May 11, 2010, *available at* <http://tvbythenumbers.com/2010/05/11/tnt-again-slam-dunks-weekly-cable-ratings/50944> (showing ESPN had 1.895 million prime-time average viewers for the week of May 3-9, 2010), *with* Bill Gorman, *ABC Catches NBC In All Major Ratings Categories For The Season*, TVbytheNumbers.com, May 4, 2010, *available at* <http://tvbythenumbers.com/2010/05/04/abc-catches-nbc-in-all-major-ratings-categories-for-the-season/50580> (showing primetime average viewership ranging from 8.41 million for ABC, to 11.89 million for CBS, from Sept. 21, 2009 through May 2, 2010).

⁸ Reliance on marketplace forces lies at the heart of retransmission consent. Such an approach is entirely consonant with numerous FCC policies in other contexts. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd 2844 (2002) (marketplace forces, not regulation, determine production and availability of advanced telecommunications services); *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076 (1984) (marketplace forces, not regulation, determine the level of non-entertainment programming provided by local broadcasters). The relief sought by the MVPDs is plainly designed to artificially disrupt the marketplace and undermine, if not eliminate, broadcaster’s primary marketplace leverage.

MVPD signal carriage and other short-term solutions. *See Chairman Julius Genachowski Statement on Retransmission Disputes*, FCC News Release (Dec. 31, 2009) (commending Sinclair and Mediacom for agreeing to an 8-day extension of their retransmission consent agreement); *William T. Lake, Chief, Media Bureau, Statement on Retransmission Dispute*, FCC News Release (Dec. 31, 2009) (same). Broadcasters, after all, are constrained by their own marketplace incentives to secure the broadest possible MVPD carriage. But in no event do the anecdotal “facts” relied on by the MVPDs, even if 47 U.S.C. § 325(b)(1)(A) did not foreclose relief, justify extraordinary FCC intervention in, and interference with, this emergent marketplace. The MVPDs are simply displeased with new marketplace realities they had managed to avoid for years, displeasure which does not merit the requested relief.⁹

⁹ The FCC adopted its existing retransmission consent rules in accordance with Section 325(b) of the Act and pursuant to proper notice and comment rule making procedures. *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd. 2965 (1993); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd. 6723 (1994). Since adopting those rules, the FCC has on other occasions rejected efforts to preempt the retransmission consent process. *See, e.g., Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) (declining Mediacom’s invitation to become involved in a retransmission consent dispute that “at bottom, arises from a fundamental disagreement between the parties over the appropriate valuation of [broadcast] signals. Such disagreements, without more, however, are not indicative of a lack of good faith. Even with good faith, impasse is possible.”).

CONCLUSION

The relief requested by the MVPD Petition has no basis in law or fact. Accordingly the MVPD Petition should be summarily dismissed.

Respectfully submitted,

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May 18, 2010

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